In the United States District Court for the Northern District of Illinois, Eastern Division

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CIVIL ACTION No. 49 C 1071

UNITED STATES OF AMERICA, PLAINTIFF

v.

E. I. DU PONT DE NEMOURS AND COMPANY, GENERAL MOTORS CORPORATION, UNITED STATES RUBBER COMPANY, CHRISTIANA SECURITIES COMPANY, DELAWARE REALTY & INVESTMENT CORPORATION, PIERRE S. DU PONT, LAMMOT DU PONT, AND IRENEE DU PONT, DEFENDANTS

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

This is an appeal from an order of the United States District Court for the Northern District of Illinois denying appellant's motion, made pursuant to 28 U. S. Code 1404 (a), to transfer the action, a civil proceeding charging violation of Sections 1 and 2 of the Sherman Act, to the District of Delaware.

Appellants predicate appellate jurisdiction upon Section 2 of the Expediting Act of February 11, 1903, 15 U. S. C. 29, as amended by Section 17 of the Act of June 25, 1948, 62 Stat. 989.

MOTION TO DISMISS

The United States, pursuant to Rule 12, par. 3, of the Rules of the Supreme Court as amended, moves that the appeal be dismissed for the reasons that the order which has been appealed is not the "final" judgment in the cause and that appeal lies only from such a final judgment.

Section 2 of the Expediting Act, as amended, provides that in any action brought by the United States under the Sherman Act, "an appeal from the final judgment of the district court will lie only to the Supreme Court."[1] This Act bars appeal from an interlocutory judgment or order (*United States* v. *California Co-operative Canneries,* 279 U. S. 553, 558; *United States Alkali Export Association* v. *United States,* 325 U. S. 196, 201), and the district court's order denying appellants' motion to transfer the action to the District of Delaware obviously is interlocutory.

It has long been settled that an order transferring a cause to another court is not a final judgment and hence not appealable under statutes authorizing appeal from "final" judgments or decisions. *Railroad Company* v. *Wiswall,* 23 Wall. 507, 508; *In re Pennsylvania Company,* 137 U. S. 451, 453.

[1] The quoted language has remained unchanged since the enactment of the Expediting Act of 1903, except that Section 17 of the Act of June 25, 1948, substituted the word "judgment" for "decree."

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Section 1404 (a) of Title 28, United States Code, provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

In the second and fourth circuits an order of transfer pursuant to Section 1404 (a) has been held to be interlocutory, and therefore not appealable (*Jiffy Lubricator Co.* v. *Stewart-Warner Corp.*, 177 F. 2d 360 (C. A. 4), *Magnetic Engineering & Mfg. Co.* v. *Dings Mfg. Co.*, 178 F. 2d 866, 868–869 (C. A. 2), and we are aware of no contrary decision. The court in the former case pointed out the distinction between dismissal of a cause in application of the doctrine of *forum non conveniens*, which "puts an end to the action" and hence is appealable (cf. *United States* v. *National City Lines, Inc.*, 334 U. S. 537), and an order of transfer, which does not end the action "but preserves it as against the running of the statute of limitations and for all other purposes." 178 F. 2d, at p. 362.

A commentary of the highest authority with respect to Section 1404 (a) unequivocably states that grant or denial of a motion to transfer "is interlocutory and non-appealable." Moore, *Commentary on U. S. Judicial Code* (1949) 210.[2]

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[2] In *Ex Parte Collett*, 337 U. S. 55, 68, the Court mentioned that Section 1404 (a) was "drafted in accordance with a

Under Rule 21 (b) of the Federal Rules of Criminal Procedure, which permits transfer of a criminal case under circumstances akin to those provided in Section 1404 (a) with respect to civil cases, an order denying transfer has been held to be interlocutory and therefore not a "final" decision appealable under 28 U. S. C. 1291. *Semel* v. *United States,* 158 F. 2d 231, 232 (C. A. 5).[3]

If the appeal in the present case is upheld, an appeal will lie from every order granting or denying transfer under Section 1404 (a) or Rule 21 of the Rules of Criminal Procedure. In cases coming within Section 2 of the Expediting Act the interlocutory order can be appealed to the Supreme Court, and in other cases to the appropriate court of appeals. Such right of appeal would impose a heavy additional burden on appellate courts, and it would open up wide vistas of delay.[4]

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memorandum * * * from the author of Moore's Federal Practice," and the Court referred (n. 29, p. 69) to the interpretation which Professor Moore had placed on the Section after its enactment.

[3] The *Semel* case was referred to with apparent approval in *United States* v. *National City Lines, Inc.*, 334 U. S. 573, n. 43 at p. 594.

[4] For example, an appeal to the Supreme Court, even if disposed of by a *per curiam* affirmance, would usually result in a delay of some four months. Sixty days is allowed for taking an appeal and the appeal is ordinarily not docketed until 40 days after it is taken.

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Cohan v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, upon which appellants reply, does not support their appeal. The case was a stockholder's derivative action, with federal jurisdiction based on diversity of citizenship. A New Jersey statute made the plaintiff in such an action liable for expenses of defending the suit if the plaintiff did not prevail, and it required the plaintiff to post security for such liability. The district court ruled that this statute was not applicable to a federal proceeding. On appeal from this ruling, the court of appeals reversed and, on review by certiorari, this decision was affirmed.

The Court distinguished between the appeal there taken under 28 U. S. C. 1291, authorizing appeals from "all final decisions" of district courts and appeal under a statute permitting appeal only from "final judgments which terminate an action." The Court said (p. 545) that it was obvious that under a statute of the latter type the order of the district court "would not be appealable." The appeal allowed by the Expediting Act is of the latter type and thus not within the holding in the *Cohen* case. The Act permits appeal from "*the* final *judgment* of the district court." Congress, by this Act, "limited the right of review to an appeal from the decree which disposed of all matters (see *Collins* v. *Miller*, 252 U. S. 364); and it precluded the possibility of an appeal * * * from an interlocutory decree." *United*

States v. *California Co-operative Canneries*, 279 U. S. 553, 558.[5]

The Court in the *Cohen* case also distinguished (p. 547) between an appeal where the contested ruling was that the right asserted was without legal basis and an appeal attacking only "an exercise of discretion" in ruling upon the right asserted, i. e., the amount of security to be required. The Court said that in the latter situation "appealability would present a different question." The instant appeal involves such "different question" and the *Cohen* decision clearly is not controlling. Here, the district court regarded the motion to transfer as within the purview of Section 1404 (a). The appeal from its ruling challenges only "an exercise of discretion" in determining the issues as to "the convenience of parties and witnesses" and "the interest of justice" raised by the motion to transfer.

MOTION TO AFFIRM

The United States, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court as amended, moves that the order of the district

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[5] In *Fifth and Walnut, Inc.* v. *Loew's, Inc.*, 176 F. 2d 587, 593 (C. A. 2), certiorari denied 338 U. S. 894, rehearing denied 338 U. S. 940, the court, in passing upon the meaning of Section 5 of the Clayton Act, 15 U. S. C. 16, said:

"Thus the statute explicitly requires 'a final judgment or decree' and does not refer, for example, to a final decision—a point of contrast made recently in the Supreme Court with respect to appealable orders. Cohen v. Beneficial Industrial Loan Corp., 1949, 69 S. Ct. 1221."

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court denying appellants' motion to transfer be affirmed, for the reason that the appeal presents no substantial question.

The issue raised by the appeal is whether the district court acted arbitrarily or unreasonably in its ruling on the motion to transfer. Since Section 1404 (a) "was drafted in accordance with the doctrine forum non conveniens" (*Ex parte Collett*, 337 U. S. 55, 58), it is appropriate to consider the principles governing grant of relief under that doctrine.

"The doctrine leaves much to the discretion of the court to which plaintiff resorts" and "the combination and weight of factors requisite to" a particular conclusion in a particular case "are difficult to forecast or state." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508. The court will weigh relative advantages and obstacles to a fair trial, but "unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Ibid.*

Certain basic facts were before the district court. The case involved exercise of control over three of America's largest corporations—General Motors, ranking first among domestic manufacturing companies; the Du Pont Company, the largest domestic producer of chemicals and explosives; and U. S. Rubber, the ranking producer of tires, tubes, and various other rubber products. These corporate defendants have their principal offices in different cities, each is "found" and

"transacts business" in the Northern District of Illinois,* and the illegal conduct charged in the complaint is not localized. The district court's opinion on the motion to transfer summarizes the charges made in the complaint as follows:

> Briefly, the violations charged against the du Pont interests are (1) the creation in 1915 by members of the du Pont family of Christiana Securities and Delaware Realty as personal holding companies for the sole purpose of perpetuating family control over the du Pont Company and its policies; causing the du Pont Company to acquire control of General Motors and United States Rubber; (2) agreeing to enhance the size, power and market control of du Pont Company, General Motors and United States Rubber at the expense of competitors; and (3) agreeing to utilize control of the du Pont Company, General Motors and United States Rubber in such a way as to eliminate competition among themselves.

The district court said that it was self-evident that at whatever place the case might be tried, "some of the parties will be inconvenienced." It

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* See Section 12 of the Clayton Act, 15 U. S. C. 22, providing that an action under the antitrust laws against a corporation may be brought not only in the judicial district of which it is an inhabitant, but also in any district in which "it may be found or transacts business." Section 1404 (a) "does not limit or otherwise modify" the choice thereby given the plaintiff as to the district in which to bring suit. *Ex parte Collett*, 337 U. S. 55, 60.

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said: "To attempt to resolve the niceties involved in balancing the relative convenience and inconveniences of all of the parties to any degree of certainty, resort must be had to an apothecary's scale and a crystal ball." The court concluded that on the "over-all picture presented" transfer of the action to the District of Delaware "would probably cause as much inconvenience to some of the parties and their witnesses as it would convenience others, and a transfer would not be in the interest of justice."

General Motors has its administrative and executive offices in Detroit, Michigan, and New York City. Detroit is the center of its manufacturing and merchandising activities. The main offices of the Du Pont Company and of U. S. Rubber are respectively located in Wilmington, Delaware, and New York City. The other two corporate defendants, Christiana Securities and Delaware Realty have their headquarters and files at Wilmington, but the general files of Christiana Securities, the more important company, are not extensive.[7]

The district court, in ruling upon the question whether Wilmington had been shown to be a more convenient forum than Chicago, appears to have given some weight to the fact that Chicago

[7] They are contained in approximately six standard file drawers. Members of the Du Pont family own the stock of Christiana Securities and Delaware Realty, which companies, in turn, hold stock of the Du Pont Company.

is nearer and more accessible to Detroit than Wilmington. There was ample justification for such consideration in view of the fact that the complaint deals, in major part, with activities of General Motors or its past or present officers. The specific allegations of the complaint are found in paragraphs 32 to 134, inclusive.[8] Of these 112 paragraphs, 86, or 77%, are concerned with the relations between General Motors and the Du Pont Company or U. S. Rubber.[9] In argument on the motion to transfer, counsel for the United States described General Motors as constituting "in many ways the primary defendant."

Institution of the suit at Chicago involved no element of "shopping" for a place of trial which might put the defendants at a disadvantage.[10] The United States, when it chose Chicago as a central point having good connections by rail and air with almost all parts of the country, took cognizance of the possible objections based on in-

[8] Paragraphs 1–31 name the defendants, describe the trade and commerce involved, give the history of the Du Pont Company prior to 1915 (when defendants' conspiracy is alleged to have begun), and set forth in general terms the offenses charged. Paragraph 134 alleges the effects of the conspiracy.

[9] The 86 paragraphs referred to are 38 through 111 and 122 through 133.

[10] A fundamental element of the doctrine of *forum non conveniens* is that "the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508. See *Williams* v. *Green Bay & Western R. R. Co.*, 326 U. S. 549, 560.

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convenience which one or more of the defendants might assert if suit were instituted at the headquarters of a particular defendant, i. e., Detroit, New York City, or Wilmington.

Under Section 1404 (a), "the convenience of parties" means the convenience of all parties to the action, including the plaintiff. The district court properly did not ignore that trial in Chicago served the convenience of the plaintiff. The investigation which led to the filing of the action was conducted by attorneys attached to the Chicago office of the Antitrust Division. They conducted the grand jury investigation in Chicago through which the plaintiff obtained, by means of subpoenas *duces tecum,* the documents which are the foundation for the allegations of its complaint.[11] It is also of some significance that, of the eleven witnesses who appeared before the grand jury and testified in response to subpoenas *ad testificandum,* two resided in Illinois, five in Michigan, one in New Jersey, one in New York City, one in Georgia, and one in Delaware.

The district court correctly said: "The choice of venue is to be determined by a preponderance of the facts and the burden is on the moving party." The present appellants plainly did not sustain the burden of proof. As we indicate below, the allegations with respect to convenience

[11] Most of the documents produced by the defendants in response to such subpoenas were in the form of photostats, with the originals being retained by the defendants.

in the affidavits which they filed in support of the motion to transfer are, to a high degree, general, indefinite, and inconclusive.

The affidavit on behalf of the Du Pont Company avers that the "great bulk" of the records essential to its defense are maintained in Wilmington; that if the cause is tried in Chicago it would be necessary to segregate and transport to that city the documents which counsel deems pertinent to defense of the cause, and the "split files" thereby resulting would create "inconvenience to the Company and to the trial of the action"; that according to counsel's present conception of the defense, "it may be necessary to call upwards of fifty witnesses", "most" of whom reside in or near Wilmington; that certain prospective witnesses have executive responsibilities in the Du Pont Company, which might be interfered with by attendance at a trial in Chicago; that a number of the prospective witnesses are of an advanced age; and that it is the opinion of defense counsel that the trial will require "at the minimum several weeks."

The affidavit on behalf of General Motors avers that many of its records relating to matters covered by the allegations of the complaint are located in New York City; that many of its present or former officials, whom it will "probably be necessary" to call as witnesses, are located in New York City "or in the eastern part of the United States"; and that General Motors' de-

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fense will probably require examination of several members of the Du Pont family and various officials and records of the Du Pont Company located in or around Wilmington.

The affidavit on behalf of U. S. Rubber avers that many of its "principal executives and important personnel" will be required to attend the trial either as witnesses or in order to assist its counsel, and thus absent themselves from the company's principal place of business in New York City; that it is a much shorter trip from New York City to Wilmington than to Chicago; and that most of the "principal" witnesses upon whom U. S. Rubber intends to rely reside in or around New York City.

The affidavits filed by the appellants definitely identify as witnesses only the defendants Pierre S. du Pont, Lammot du Pont, and Irenee du Pont.

We submit that, under all the circumstances, it is clear that the district court did not overstep the wide discretionary authority vested in it in ruling on the issues of convenience of parties and witnesses and the interest of justice, issues to be determined by a balancing of necessarily indefinite factors.

PRAYER FOR DISMISSAL OR AFFIRMANCE

For the reasons stated, it is respectfully submitted that the appeal should be dismissed or that the decree of the district court should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1950.

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